PSC REF#: 34207

Public Service Commission of Wisconsin
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BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

Petition of Wisconsin Power and Light Company for Declaratory Ruling Pursuant to Wis. Stat. § 227.41 for Declaration Under Wis. Stat. § 196.50(1) That it is Eligible to Provide Retail Electric Service to the Portion of an Area Annexed From the Town of Blooming Grove Into the City of Madison Known as the Secret Places Subdivision

6680-DR-108

FINAL DECISION

Introduction

On May 25, 2004, Wisconsin Power and Light Company (WP&L) filed a Petition for a Declaratory Ruling pursuant to Wis. Stat. § 227.41, to determine that it is eligible under Wis. Stat. § 196.50(1) to provide retail electric service to the portion of an area near McFarland annexed from the Town of Blooming Grove into the city of Madison in September 2002, known as the Secret Places Subdivision (Secret Places). WP&L has a franchise permit to serve the town of Blooming Grove. Madison Gas and Electric Company (MGE) has an indeterminate permit to serve the city of Madison.

On June 11, 2004, the Commission received a Notice of Appearance and Motion to Dismiss the petition on its merits from MGE, pursuant to Wis. Stat. § 196.495(2), based on an indeterminate permit and right to serve, or for dismissal without prejudice pursuant to Wis. Stat. § 227.41(2)(a). The Commission accepted the Petition for Declaratory Ruling at its open meeting on July 22, 2004.

A Commission notice was mailed on August 10, 2004, and a prehearing conference was held August 23, 2004. At the prehearing conference, a briefing schedule was established

regarding MGE's motion to dismiss on the grounds that only MGE has the right and the duty to serve Secret Places. Alternately, MGE also moved for dismissal without prejudice on the grounds that the petition does not conform to the formal requirements of Wis. Stat. § 227.41(2).

The parties concur that the material facts are not in dispute. MGE has an indeterminate permit to serve the city of Madison. The territory in dispute was annexed to the city of Madison in September 2002. WP&L had no electric distribution facilities in the annexed area at the time of annexation.

Findings of Fact

1. MGE and WP&L are public utility corporations organized and existing under the laws of the state of Wisconsin.

2. MGE holds an indeterminate permit to provide electric services to the city of Madison.

3. Secret Places, the disputed territory in this declaratory ruling request, was annexed to the city of Madison on September 17, 2002.

4. WP&L had no electric distribution facilities in the annexed area at the time of annexation.

Conclusions of Law

The Commission has jurisdiction and authority to act on this matter under Wis. Stat. §§ 196.03, 196.495 and 196.50.

Opinion

This dispute concerns the extension of new service to Secret Places, an area annexed to the city of Madison in September 2002. MGE has an indeterminate permit to provide gas and electric service to customers in the city of Madison. Prior to annexation, this territory was within the Town of Blooming Grove, an area served by WP&L. It is undisputed that WP&L does not have facilities within Secret Places. WP&L requests that the Commission determine that WP&L has the opportunity to serve Secret Places pursuant to Wis. Stat. § 196.50.

Wis. Stat. 196.495, the antiduplication statute

The resolution of this dispute depends upon the interpretation of the second sentence of Wis. Stat. § 196.495(2) which governs disputes in areas annexed after 1961 and provides as follows:

> (2) . . . Within any area annexed to a city or village after January 1, 1961, in which annexed area a cooperative association or public utility, other than the public utility serving the city or village under an indeterminate permit, has electric distribution facilities at the time of the annexation, the cooperative association or other public utility may make a primary voltage extension or a secondary voltage extension in the annexed area, subject to sub. (1m)

MGE maintains that Wis. Stat. § 196.495(2) describes the only circumstance where a rival utility may make an electric distribution extension into an area annexed after 1961. Specifically, a rival utility may extend service only if such utility had electric distribution facilities in the area at the time of annexation. WP&L did not have existing electric distribution facilities within Secret Places at the time of annexation. As a consequence, MGE contends that WP&L cannot lawfully extend its distribution system to Secret Places.

WP&L argues that Wis. Stat. § 196.495(2) does not give MGE an exclusive right to provide service. WP&L asserts that the second sentence of Wis. Stat. § 196.495(2) is

inapplicable to this matter for two reasons. First, WP&L interprets this sentence to apply only where there were distribution facilities in the area at the time of annexation. (WP&L, Brief at 5) Because no facilities existed within the annexed territory, WP&L reasons that the more general provisions of Wis. Stat. § 196.50(1) control. Second, WP&L argues that an "indeterminate permit" alone does not give a utility an exclusive right to provide service to an annexed area. (WP&L, Brief at 5)

The primary objective of statutory interpretation is to implement the intent of the legislature. Wis. Stat. § 196.495 is titled "*Avoidance of Duplication in Electric Facilities.*" The title well describes the purpose of this law, which has long existed to protect the consuming public from paying for unnecessary cost of delivering electricity. W*isconsin Power and Light Co. v. Public Service Commission*, 45 Wis. 2d 253, 259, 172 N.W.2d 693 (1969). The statute also prohibits the duplication of facilities so our state's environment will not be burdened by unnecessary projects that consume state resources. *Complaint and Petition of Vernon Electric Cooperative for Declaratory Ruling*, Order, Docket No. 6080-DR-100 (October 6, 1994).

WP&L's argument is contrary to well-established principles of statutory construction. First, the second sentence does not require the incumbent utility to have distribution facilities to be applicable in areas annexed after 1961. The reference to "existing facilities" clearly relates to a rival utility. Second, to interpret this sentence as merely being permissive makes it entirely superfluous. The legislature does not need to write a law that simply permits a utility to do something, unless some other law appears to prevent the action and the legislature wants to make clear that the action is legal. But no other statute appears to prevent what this sentence allows. By WP&L's interpretation, the sentence merely repeats what Wis. Stat. § 196.495(1m) already

allows. A statute should not be construed so as to render any portion or word surplusage. *State v. Wisconsin Telephone Co.*, 91 Wis. 2d 702, 714, 284 N.W.2d 41 (1979). *See State v. Kruse*, 101 Wis. 2d 387, 395, 305 N.W.2d 85 (1981) and *In re Marriage of Lang v. Lang*, 161 Wis. 2d 210, 220, 467 N.W.2d 772 (1991).

The better interpretation of this statute is that the Legislature allows a rival utility to enter the annexed area in one specific situation (if the rival utility had distribution facilities in the area at the time of annexation), and if this specific condition is not met, the action is prohibited. As the Court stated in *State ex. Rel. Harris v. Larson*, 64 Wis. 2d 521, 527, 219 N.W.2d 335 (1974), "The enumeration of the specific alternatives is evidence of legislative intent that any alternative not specifically authorized is to be excluded."

The Commission previously applied this interpretation in the *DeJope* bingo case as addressing whether a rival utility had a right to serve in an annexed area.[1] That case involved a dispute between these same parties. *DeJope* involved territory annexed to the city of Madison in 1992. Although it had no distribution facilities in the annexed territory, WP&L extended service in late 1995. MGE filed a complaint with the Commission, alleging that Wis. Stat. § 196.495(2) prohibited WP&L from extending its service into the annexed territory. In its decision, the Commission determined that this subsection precluded WP&L from extending service because to read the statute as merely permissive would render it surplusage.[2]

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[1] *Complaint of Madison Gas and Electric Company Against Wisconsin Power and Light Company for Making a Primary Extension to Service Premises (The De Jope Bingo Facilities) Located in the City of Madison, Dane County*, Order, Docket No. 6680-DR-104 (July 2, 1996).

[2] WP&L appealed the Commission's *DeJope* decision to the Dane County Circuit Court and the Commission decision was upheld *Wisconsin Power and Light Company v. Public Service Commission of Wisconsin,* Case No. 96-CV-1773 (April 8, 1997).

WP&L attempts to distinguish *DeJope* by stating that it "stands for the proposition that when an area is annexed into a city, . . . a second utility has a *right* to serve that area . . . only if the second utility had distribution facilities in the area at the time of annexation." (WP&L, Petition at 2) In making this argument WP&L simply ignores *DeJope's* explicit holding:

> [In section 196.495(2)] the Legislature allows a second utility to enter the annexed area in one specific situation (if the second utility had distribution facilities in the area at the time of annexation), and *if this specific condition is not met, the action is prohibited.*
>
> Order dated July 2, 1996, at page 5, PSCW Docket 6680-DR-104. (Emphasis added.)

WP&L incorrectly insists that this case is controlled by *Adams-Marquette Electric Cooperative, Inc. v. Public Service Commission,* 51 Wis. 2d 718, 188 N.W. 2d 515 (1971). WP&L refers to the court's observation that a utility with an indeterminate permit does not have an exclusive right to serve annexed territory. (WP&L, Brief at 7) WP&L fails to recognize that this observation is *dicta* and is not controlling. WP&L made the same argument in *DeJope.* The argument was rejected by the Commission and the circuit court because the court in *Adams-Marquette* did not construe Wis. Stat. § 196.495(2). Instead, *Adams-Marquette* dealt with subsection (1) of the statute. As the Court stated: "In this case (No. 355) we decide only one issue: that MG&E is not precluded by Wis. Stat. § 196.495(1) from providing service to West Towne." Id. at 745.

WP&L correctly contends all of Chapter 196 should be considered together and that Wis. Stat. §§ 196.495(2) and 196.50 must be read together. The Commission's application of Wis. Stat. § 196.495(2) to foreclose a rival from providing service in annexed territory does not undermine or conflict with Commission's authority in a particular factual context to issue a

Certificate of Public Convenience and Necessity pursuant to Wis. Stat. § 196.50. For example, factual circumstances not controlled by Wis. Stat. § 196.495 are subject to Wis. Stat. § 196.50.

The Commission's interpretation of this statue also conforms to prior interpretations. In *Petition of Madison Gas and Electric Company for a Declaratory Ruling as to Whether Petitioner or Wisconsin Power and Light Company is Authorized to Render Electric Service to the "Tamarack Trails" Condominium Project on the Extreme West Side of Madison*, 59 Wis. PSC 43 (1974), the Commission ruled on a situation where Madison annexed lands in 1967 and 1970, part of which WP&L had been serving since 1920. A developer sought to build a residential complex in the area, and MGE petitioned for a declaration from the Commission that it had the sole right to serve this complex because of its indeterminate permit. The Commission began its analysis with the general anti-duplication prohibition of Wis. Stat. § 196.50, but then incorporated the specific exemption stated in Wis. Stat. § 196.495(2). It concluded, "If WP&L had not historically held itself out to serve any part of the area here in dispute, MGE would have the exclusive statutory right to serve." *Tamarack Trails,* 59 Wis. PSC at 47-48.

WP&L alleges that there are other factors that should be taken into account in determining whether MGE's indeterminate permit provide an exclusive right to extend service. According to WP&L, environmental impacts, cost of service, reliability concerns and total construction costs favor service extension by WP&L. MGE disputes these assertions.

WP&L's argument fails to take the legislative history of this section into account. Prior to 1991, Wis. Stat. § 196.495(2) required rival service providers to show that they were "rendering service" in the area at the time of annexation. With the enactment of 1991 Wisconsin Act 94, the legislature amended Wis. Stat. § 196.495(2) to change this criteria to "having electric

distribution facilities" at the time of annexation. The effect of this revision was to broaden the criteria for rival utilities to extend service in post 1961 annexed territory. The Legislature also repealed Wis. Stat. § 196.495(2)(e) which expressly provided the Commission with the right "to determine and fix area service boundaries in the annexed area" between a cooperative association and the incumbent provider. The effect of these amendments was that service disputes would be subject to the criteria in Wis. Stat. § 196.495(1m) if a rival utility or cooperative had facilities in place at the time of annexation. If the legislature had intended to require consideration of other factors when facilities were not present it would have said so.

WP&L asserts that in this case the annexation process did not yield the "most logical or cost-effective territorial boundaries for extending utility service." (WP&L, Petition at 9) WP&L implies that the annexation process was unfair. However, this Commission is not statutorily authorized to pass judgment upon annexation processes. In other contexts the courts have recognized public policies supporting the extension of exclusive water utility services to annexed territories. *CF. Town of Sheboygan v. City of Sheboygan* 203 Wis 2 274, 553 N.W. 2d 275 (Ct. App. 1996) (City automatically acquired right to furnish vacant land with water service under Wis. Stat. § 60.79.)

In the alternative, MGE argues that the Petition should be dismissed without prejudice for failing to conform to the requirements of Wis. Stat. § 227.41(2), because the WP&L petition does not contain a concise statement of the facts as to which a declaratory ruling is requested. MGE states the petition contains a narrative argument that relies on numerous assertions of facts, many of which are disputed by MGE. Furthermore, MGE argues the petition is not a verified petition which would violate Wis. Stat. § 227.41(2)(c). WP&L challenges MGE's assertions

stating that its petition clearly sets out the facts supporting its arguments. It believes MGE challenges are to alleged technical flaws and supplied an affidavit to cure one alleged defect. The Commission also agrees that the petition does not conform to the requirements of Wis. Stat. § 227.41(2)(c).

Conclusion

Therefore, for all the reasons stated, the Commission orders dismissal of WP&L's petition for declaratory ruling.

Dated at Madison, Wisconsin, May 17, 2005

By the Commission:

Christy L. Zehner

Christy L. Zehner
Secretary to the Commission

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See attached Notice of Appeal Rights

Notice of Appeal Rights

Notice is hereby given that a person aggrieved by the foregoing decision has the right to file a petition for judicial review as provided in Wis. Stat. § 227.53. The petition must be filed within 30 days after the date of mailing of this decision. That date is shown on the first page. If there is no date on the first page, the date of mailing is shown immediately above the signature line. The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

Notice is further given that, if the foregoing decision is an order following a proceeding which is a contested case as defined in Wis. Stat. § 227.01(3), a person aggrieved by the order has the further right to file one petition for rehearing as provided in Wis. Stat. § 227.49. The petition must be filed within 20 days of the date of mailing of this decision.

If this decision is an order after rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not an option.

This general notice is for the purpose of ensuring compliance with Wis. Stat. § 227.48(2), and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

Revised 9/28/98